313 U.S. 54

Office - Supreme Court, U. S.
FILED
MAY 13 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1940.

No. 1051

THE AMERICAN TOBACCO COMPANY and
R. J. REYNOLDS TOBACCO COMPANY,
(Libellants-Appellees Below),

against

Steamship *Katingo Hadjipatera,* her engines, boilers, etc.,
and J. C., N. C. and A. C. HADJIPATERAS,
Respondents.

K. DIAMANTOPOULOS, Minister to the United States for
the Kingdom of Greece,
(Petitioner-Appellant Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CARVER W. WOLFE,
Proctor for Petitioner.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

TABLE OF CONTENTS.

	PAGE
Petition	1
I. Statement of Matters Involved	2
II. Questions Presented	7
III. Reasons relied on for allowance of the writ	9
IV. Prayer for Writ	9
Brief in Support of Petition for Writ of Certiorari	11
I. Opinions of Courts below	11
II. Jurisdiction of this Court	12
III. The Facts	12
POINT I—A vessel of a friendly sovereign government in its possession and service is immune from suit in Courts of Admiralty of the United States	16
POINT II—The prayer of petitioner should be granted	20

INDEX OF AUTHORITIES CITED.

Berizzi Bros. Co. v. *The Pesaro*, 271 U. S. 562	9, 16, 17, 18
Compania Espanola, Etc. v. *The Navemar*, 303 U. S. 68	9, 16, 17, 18
Ex Parte Muir, 254 U. S. 522	9

STATUTE.

Judicial Code, Section 240 as Amended, U. S. Code, Title 28, 347	12

Supreme Court of the United States

OCTOBER TERM—1940.

No.....

THE AMERICAN TOBACCO COMPANY and R. J. REYNOLDS TOBACCO COMPANY,
(Libellants-Appellees Below),

against

Steamship *Katingo Hadjipatera,* her engines, boilers, etc., and J. C., N. C. and A. C. HADJIPATERAS,
Respondents.

K. DIAMANTOPOULOS, Minister to the United States for the Kingdom of Greece,
(Petitioner-Appellant Below).

PETITION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of K. Diamantopoulos, Minister to the United States for the Kingdom of Greece for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows:

Statement of Matters Involved.

This is a proceeding in admiralty begun by the filing of a libel, for cargo damage, in the United States District Court for the Southern District of New York, by the American Tobacco Company, claiming damage in the amount of $185,000, and R. J. Reynolds Tobacco Company claiming damage in the sum of $200,000. The libel was *in rem* against the Steamship *Katingo Hadjipatera,* and *in personam* against J. C., N. C. and A. C. Hadjipateras, as owner and operator of the Steamship *Katingo Hadjipateras* with a writ of foreign attachment.

The vessel has been seized by the United States Marshal for the Southern District of New York, in this suit, and is now being held in custody by him, although it is urgently needed by the Greek Government to prosecute the war in which it is engaged.

By cable from the Greek Minister in London dated February 22, 1941 Captain Courbellis, Director of the Mercantile Marine Division of the Greek Consulate General, was notified that the Greek Steamer *Katingo Hadjipatera* had been requisitioned by the Greek Government (16, 28, 31, 58, 69 and 70) (references are to pages). Thereafter on February 25th, 1941, Captain Courbellis, by letter, notified the Master of the vessel that his vessel had been requisitioned by the Greek Government. (Exhibit B, attached to the Suggestion of Immunity (28); Exhibit 1 and translation thereof Exhibit 1-A (71). This notice was received by the Master of the vessel, Captain Skinitis, on the arrival of the vessel at Newport News on February 26th, 1941 and in a telephone conversation to Captain Courbellis on that same day, Captain Skinitis acknowledged receipt of the notice and accepted the requisition (23, 56, 73, 81 and 94).

The district court in its opinion which was adopted by the Circuit Court of Appeals (127) found:

> "On February 26, at about 3:15 Captain Courbellis was telephoned by Captain Skinitis and in that telephone conversation Captain Skinitis acknowledged the receipt of that notice of the requisitioning of his vessel and stated in effect that he would abide by it" (108).

After discharging the Newport News and Norfolk cargo, in accordance with the orders of Captain Courbellis, the vessel proceeded to New York, where she arrived on March 7th, 1941 (52).

On that day the libel herein was filed (11) and on March 13th, 1941, your Petitioner, the Greek Minister to the United States, made his representations with respect to sovereign immunity to the Secretary of State (23ff).

On March 14th, 1941, the Honorable Cordell Hull, Secretary of State of the United States, transmitted to the Attorney General of the United States the note of the Greek Minister, suggesting that the Attorney General instruct the appropriate United States Attorney to appear in the proceedings:

> "* * * without argument or comment on his part, other than to state that the statements of the Government of Greece made in its behalf by the Greek Minister at Washington are brought to the attention of the Court as a matter of comity between the Government of the United States and the Government of Greece" (22).

Thereafter, the United States Attorney for the Southern District of New York, under date of March 17th, 1941 filed a Suggestion of Immunity, stating:

> "• • • The undersigned presents this suggestion as a matter of comity between the United States Government and the Government of the Kingdom of Greece for such consideration as this Court may deem necessary and proper" (19-20).

On the same date Judge Leibell signed an order to show cause:

> "• • • why an order should not be made and entered herein dismissing the suit of American Tobacco Company and R. J. Reynolds Tobacco Company against the Steamship *Katingo Hadjipatera,* her engines, boilers, etc., and J. C., N. C. and A. C. Hadjipateras, and order wholly dismissing the above entitled suit for want of jurisdiction on the ground that said suit is brought against property of a friendly sovereign nation not subject to the jurisdiction of this court, and immune from suit in this court • • •" (13-14).

On March 31st, 1941, the Acting Secretary of State transmitted a note to the Attorney General, at the request of the District Court, in which it was stated:

> "The position of the Department as set forth in its letter of March 14, 1941 to you in regard to this vessel is similar to that which has been taken by it in other cases involving the question of the requisition of merchant vessels by foreign governments" (55).

On March 21st, 1941, affidavits of Henry N. Longley and John W. R. Zisgen were filed in answer to the order to show cause, denying:

> (1) "that the said suit is brought against the property of a friendly sovereign nation."

(2) "that there is any fact alleged, or attempted to be shown, in any of the papers served on these libellants with said order, or filed in this Court, which supports the statement in said order to show cause that the property proceeded against is immune from suit in this Court; * * *"

(3) "that the said Steamship *Katingo Hadjipatera* is not subject to the jurisdiction of this Court;"

(4) "that any fact whatever has been established in this cause which shows that J. C., N. C., and A. C. Hadjipateras, or their property are in any way immune from process of this Court" (35).

On March 21st, 1941, Captain Courbellis and John C. Monroe filed affidavits in reply to the answer to the order to show cause, denying certain of the allegations contained in the affidavits in support of the answer to the order (56-62).

Judge Leibell heard testimony on the issue:

"* * * whether or not the master was served with a notice that the vessel had been requisitioned by the Greek Government, and if so served, whether he took actual possession of the vessel on behalf of the Greek Government, and when and where and by what means he did so" (67).

The Government of the Kingdom of Greece produced as witnesses Captain Courbellis and Captain Skinitis on the evening of March 24, 1941 (63 ff.). At the conclusion of this testimony, Judge Leibell gave proctors for libellants one day after receipt of the transcript of testimony to determine whether further testimony would be taken on their behalf, directing the proctors for the libellants to

notify the proctors for the Greek Government whether such additional testimony was to be taken (104-105).

On the following morning, proctors for the libellants notified proctors for the Greek Government that no further testimony would be taken, and in accordance with Judge Leibell's directions, both parties appeared before him on the afternoon of March 25th, 1941 (106). At that time, Judge Leibell orally made his findings of fact and conclusions of law, the nub of which was that the vessel had been requisitioned as of the date of February 26th, 1941, when the said requisition was accepted by the master, but that the requisition was not to take effect until after the westbound cargo had been discharged (106 ff.). Upon these findings of fact and conclusions of law, Judge Leibell entered an order from which an appeal was taken (114 ff.) to the Circuit Court of Appeals for the Second Circuit.

The Circuit Court of Appeals on the 23rd day of April, handed down its decision, without writing an opinion, affirming the District Court on the opinion of the District Court. The opinion of the Circuit Court of Appeals is as follows:

"Judgment affirmed on opinion below" (127).

The order affirming the judgment of the District Court was entered on May 9th, 1941 (128).

The Steamship *Katingo Hadjipatera* is now still in the custody of the U. S. Marshal for the Southern District of New York, although the Kingdom of Greece is a friendly government and is in urgent need of the vessel to prosecute the war in which it is engaged. Grave damage is being done to the Greek Government in preventing the Steamship *Katingo Hadjipatera* from engaging upon its vital government service for the Kingdom of Greece. It is of the utmost

urgency that the action be vacated and the vessel released from arrest immediately so that it may proceed upon the business of the Greek Government.

Questions Presented.

1. Is a vessel which has been requisitioned by a friendly foreign sovereign government, which requisition has been recognized and accepted by her master and which vessel has entered into the service of the foreign government, free from suit in the courts of the United States?

2. Where an inbound vessel with a cargo aboard to be delivered in United States ports is requisitioned by a friendly foreign sovereign, prior to the delivery of the inbound cargo, and prior to the filing of any libel against said vessel for cargo damage, is the mere fact that the registered owners' agent assists the master in entering the vessel through the Customs, and that the vessel makes certain payments for ship's expenses out of funds supplied by the owner, and the further fact that no endorsement was made on the ship's papers referring to the requisition, sufficient to warrant the holding below that the friendly foreign sovereign, namely, the Greek Government, did not have actual "physical possession" of the vessel from the time that the requisition of said vessel was accepted by the vessel's master?

3. In order to obtain "physical possession" of a vessel requisitioned by a friendly foreign sovereign, is it necessary that the requisitioning friendly foreign power send a diplomatic or consular representative aboard such vessel?

4. Where the master of a vessel, requisitioned by a friendly foreign sovereign, accepts such requisition and acknowledges that he will abide by its terms, is not the master of such vessel then the representative of such requisitioning friendly sovereign and in "physical possession" of such vessel on behalf of the sovereign?

5. Is not the question whether a vessel which has been requisitioned by a friendly foreign sovereign is "in possession" of such sovereign, purely a question of law, and not one of fact?

6. The Circuit Court on undisputed evidence found that the Greek Government requisitioned the vessel. Has not the Circuit Court of Appeals failed to consider undisputed evidence before it, establishing that possession was taken by the Greek Government and that the vessel entered into the service of the Greek Government, with the result that under the decisions of this court a friendly foreign sovereign has been deprived of property to which it is entitled?

7. Has not the Circuit Court of Appeals, in view of the undisputed evidence before it erroneously decided that the Greek Government did not take possession of the vessel with the result that a friendly foreign sovereign has been unjustly deprived of its property?

8. Has not the Circuit Court of Appeals erroneously reached the conclusion from undisputed evidence that neither Captain Courbellis nor Captain Skinitis, Master of the *S. S. Katingo Hadjipatera,* took possession of the vessel on behalf of the Greek Government?

9. Has not the Circuit Court of Appeals misapplied the undisputed facts and arrived at an erroneous conclusion

of law on the question of possession with the result that a friendly foreign sovereign has been deprived of urgently needed property to which it is entitled?

Reasons Relied on for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals decides a question in conflict with applicable decisions of this Court such as *The Navemar,* 303 U. S. 68; *Berizzi Bros. Co.* v. *S. S. Pesaro,* 271 U. S. 562; *Ex Parte Muir,* 254 U. S. 522.

2. The Circuit Court of Appeals has erroneously decided an important question of admiralty and international law in conflict with the weight of authority.

3. The Circuit Court of Appeals has failed to draw the correct conclusion of law from the undisputed testimony before it with the result that a friendly foreign sovereign government has been improperly deprived of urgently needed property to which it is entitled.

4. The Circuit Court of Appeals by erroneously ignoring the undisputed testimony before it has decided a question of law which adversely affects the relations of this government with a friendly foreign sovereign.

5. The decision of the Circuit Court of Appeals involves an important question of maritime and international law, conflicting with the applicable principles of this Court, resulting in depriving a friendly foreign nation of possession of property to which it is entitled.

WHEREFORE, Petitioner prays that this Court issue a writ of certiorari to the United States Court of Appeals

for the Second Circuit, directing it to send to this Court in full, the transcript of records in the case entitled:

"The American Tobacco Company and
R. J. Reynolds Tobacco Company,
Libellants-Appellees,

—against—

Steamship *Katingo Hadjipatera,* her engines, boilers, etc., and J. C., N. C. and A. C. Hadjipateras,
Respondents.

K. Diamantopoulos, Minister to the
United States for the Kingdom
of Greece
Appellant.

October Term, 1940—No. 297."

and that the decision of said Circuit Court of Appeals entered on the 23rd day of April, 1941, and the order entered on the 9th day of May, 1941, be reversed and for such other and further relief as under the premises may be just.

Dated, New York, New York, May , 1941.

K. Diamantopoulos
Minister to the United States for
the Kingdom of Greece.

By .....
Counsel for Petitioner.

I hereby certify that I have examined the foregoing Petition and in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

.....
Counsel for Petitioner.